179 (2)

Supreme Court, U.S.
FILED
DEC 21 2010
OFFICE OF THE CLERK

No. 10-717

IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

KRAUS-ANDERSON CONSTRUCTION COMPANY

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

NORMAN DAVIS
Counsel of Record
SQUIRE SANDERS
& DEMPSEY, LLP
200 S. Biscayne Boulevard
Suite 4100
Miami, Florida 33131
(305) 577-2988
ndavis@ssd.com

Counsel for Respondent

December 21, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

In this case, the Eleventh Circuit held that the enforcement of a tribal court judgment does not present a federal question under 28 U.S.C. § 1331. This directly contradicts holdings by the Ninth and Tenth Circuits that find a federal question in the inherent federal character of Indian law, the application of comity under federal common law, and the federal nature of the adjudicatory authority of the tribes. This case thus presents the question:

> Whether an action to obtain recognition of an Indian tribal court judgment presents a federal question under 28 U.S.C. § 1331.

RULE 29.6 STATEMENT

There is no publicly-held corporation owning 10% or more of the stock of Respondent Kraus-Anderson Construction Company. Respondent's parent corporation is Kraus-Anderson Companies, Inc., and no publicly-held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

1. The Contracts and a Trial 1
2. An Appeal In The Tribal Court 2
3. The District Court 3
4. The Eleventh Circuit 3

REASONS FOR GRANTING THE PETITION 4

I. THE ELEVENTH CIRCUIT'S OPINION CREATES A SIGNIFICANT SPLIT AMONG CIRCUITS 4

II. THE ELEVENTH CIRCUIT WRONGLY ASSERTED THAT THE DOCUMENT FILED BY THE TRIBE IN DISTRICT COURT REQUIRED JURISDICTION FOR A 'DEMAND' OR A 'CLAIM' 5

III. THE PRINCIPLES TO BE APPLIED IN TRIBAL JUDGMENT ENFORCEMENT PROCEEDINGS FALL WITHIN FEDERAL COMMON LAW 7

IV. THE TRIBE HAS SOVEREIGNTY LIKE THAT OF A FOREIGN NATION 11

V. MANY TRIBES ARE BECOMING ECONOMIC POWERHOUSES THAT WOULD BENEFIT FROM MORE FEDERAL VIGILANCE.....12

CONCLUSION.....13

TABLE OF AUTHORITIES

Page(s)

Cases

Bird v. Glacier Electric Cooperative, Inc.,
255 F.3d 1136 (9th Cir. 2001) 10

Hilton v. Guyot,
159 U.S. 113 (1895) 8, 9, 11

In Re Treco,
240 F.3d 148 (2d Cir. 2001) 9

International Nutrition Co. v. Horphag Research, Ltd.
257 F.3d 1324 (Fed. Cir. 2001) 9

MacArthur v. San Juan County,
391 F. Supp. 2d 895 (D. Utah 2005),
rev'd on other grounds, 497 F.3d 1057
(10th Cir. 2007) 6

MacArthur v. San Juan County,
497 F.3d 1057 (10th Cir. 2007) 10

Miccosukee Tribe Of Indians of Fla. v. Kraus-Anderson Construction Co.,
607 F.3d 1268 (11th Cir. 2010) 6, 7

National Farmers Union Ins. Co. v. Crow Tribe of Indians,
471 U.S. 845 (1985) 10

Pravin Banker Associates v. Banco Popular Del Peru,
109 F.3d 850 (2d Cir. 1997) 9

Solis v. Matheson,
563 F.3d 425 (9th Cir. 2009) 12

U.S. v. Wheeler,
435 U.S. 313 (1978) 11

Wilson v. Marchington,
127 F.3d 805 (9th Cir. 1997) 7, 9, 10

STATUTES

28 U.S.C. § 1331 ..... 6, 7, 10

OTHER AUTHORITIES

Restatement (Third) of the Foreign
Relations Law of the United States 8

BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

Petitioner Miccosukee Tribe of Indians of Florida (the "Tribe"), seeks a writ of certiorari for review of a judgment by the Court of Appeals for the Eleventh Circuit. That court held that a federal district court did not have subject matter jurisdiction to consider whether to recognize and enforce a tribal court judgment.

Respondent Kraus-Anderson Construction Company ("Kraus-Anderson"), with this brief supports the request for a writ of certiorari, although Respondent presents additional and more conclusive arguments in favor of such a writ.

STATEMENT OF THE CASE

1. The Contracts and a Trial

This case began with contracts entered into between the Tribe and Kraus-Anderson over a decade ago pertaining to the construction of various facilities on the reservation in Miami-Dade County, Florida. Kraus-Anderson agreed in the contracts to refer any disputes arising from the execution of the contracts to the Tribal Court. Certain contractual disputes eventually arose, based primarily on the Tribe's unwillingness to pay certain amounts to Kraus-Anderson for work performed.

In due course, Kraus-Anderson filed a complaint in the Tribal Court to recover approximately $7,000,000 in unpaid invoices. In 2004, the legal proceedings in the Tribal Court concluded. That court's decision denied all claims by Kraus-Anderson, and instead awarded the Tribe $1,600,000 pursuant to the Tribe's putative counterclaim. Kraus-Anderson has

consistently disputed that the Tribe properly asserted a counterclaim (a point that it will make again if any further district court proceedings become necessary).

2. An Appeal In The Tribal Court

On July 1, 2004, Kraus-Anderson filed a notice of appeal. Paradoxically, the notice was not directed to a judge or a court official, but as required by the tribal code, the notice was directed to the Tribe's five-member Business Council. The items sought to be reviewed by the Miccosukee Court of Appeals included, but were not limited to, the following matters: (a) matters had been decided that were not before the Tribal Court for decision; (b) the court's final decision contained several mistakes on the calculation of figures related to the award; (c) the court had excluded certain matters material to the controversy; and (d) errors of law and fact in the decision demonstrated an overall prejudice against Kraus-Anderson.

The Business Council administers tribal affairs, and had a direct interest in the outcome of the Tribal Court and its judgment. Members of the Council had been involved in negotiating the construction contracts, and involved in the resolution of construction issues as they arose along the way. The Council's chairman, Billy Cypress, had testified on behalf of the Tribe in the course of the trial. The Council members were intertwined with the contract controversy in many ways.

The Business Council, in a one-page letter, denied Respondent the right to an appeal to the Court of Appeals. As a tribal business entity, rather than a judicial entity, the Council concluded, having heard

no presentation, that the Tribal Court's decision did not constitute a departure from the essential requirements of the law. The appeal was disallowed, and the Council declared its decision to be final.

3. The District Court

When Kraus-Anderson, for abundant legal reasons, did not honor the tribal judgment, the Tribe sought to have the judgment recognized and enforced by a United States District Court for the Southern District of Florida. Kraus-Anderson set forth those reasons in its answer to the Tribe's complaint.

In due course, the district court entered summary judgment for Kraus-Anderson. In determining whether the tribal judgment should be recognized and enforced, the district court applied principles of comity. The court also applied comity and federal common law in support of subject matter jurisdiction in district court. Under those principles, the district court agreed that Kraus-Anderson was correct in saying that the tribal judgment had been created through multiple violations of due process. The district court did not consider whether the Tribe's counterclaim, on which the monetary award to the Tribe in the judgment was based, was valid because it held that the due process failures were controlling.

4. The Eleventh Circuit

The Tribe sought reversal by the Eleventh Circuit of the district court's summary judgment order. The circuit reversed the order, but only because the court said that subject matter jurisdiction did not exist in a district court for the recognition and enforcement of a tribal judgment. The merits of the summary judgment order were not addressed.

The circuit court did not set forth any basis on which a party could seek recognition and enforcement of a tribal judgment in a federal court, and indeed said that such subject matter jurisdiction could not exist. Two other circuits have accepted and dealt with tribal judgments on the basis of comity, as an aspect of federal common law. The Eleventh Circuit opinion contains no discussion whatsoever of comity.

Respondent Kraus-Anderson asked the Eleventh Circuit for a rehearing by the panel or by the full court. The court denied the petition.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S OPINION CREATES A SIGNIFICANT SPLIT AMONG CIRCUITS

As outlined in this brief, the Ninth Circuit and the Tenth Circuit years ago formalized the acceptance in district courts of tribal judgments to determine whether they were recognizable and enforceable. With virtually no reference to the contradicting circuits, the Eleventh Circuit has now reached the exact opposite conclusion.

The split is amplified by the spread of Indian entities in the three circuits.[1] The Ninth Circuit has

---

[1] The numbers shown are derived from a Notice from the Bureau of Indian Affairs, published in 2007, identifying Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs. *See* Fed. Register, Vol. 72, No. 55, March 22, 2007. Not every tribe in each circuit has a tribal court system (except for those in the Eleventh Circuit),

approximately 186 Indian groups, the Tenth Circuit has 65, and the Eleventh Circuit has three. A large number of tribes in the Ninth and Tenth Circuits have the protection of tribal court systems and access to federal courts when tribal judgments become an issue. Parties in those three tribal courts in the Eleventh Circuit may actually choose to seek recognition of a judgment in a federal court in the West (in light of the opinion below).

What looms is a mixture of federal court and some state court determinations as to the integrity and enforceability of tribal judgments. The paradox is that Indian tribes have no consequential ties to states, but they are tightly intertwined with the federal government. Congress has plenary control – complete in every respect – over the tribes. There should be *consistency* in the assessment of tribal judgments, and that can only mean federal review.

It is highly significant that the Eleventh Circuit's creation of a barrier to recognition is based solely on subject matter jurisdiction in the district courts, a barrier that two other circuits – and the district court in this matter – found did not exist.

II. THE ELEVENTH CIRCUIT WRONGLY ASSERTED THAT THE DOCUMENT FILED BY THE TRIBE IN DISTRICT COURT REQUIRED JURISDICTION FOR A 'DEMAND' OR A 'CLAIM'

Throughout its opinion, the Eleventh Circuit panel contended that the district court should treat its subject matter jurisdiction based upon the nature of the relief sought under the tribal judgment, ignoring

---

but the ongoing growth of the tribes reflects needs and interests for such systems.

the fact that Indian law itself is federal in nature. "Pursuant to § 1331, district courts have original jurisdiction over 'all civil actions arising under the Constitution, laws, or treaties of the United States.'" *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Construction Co.*, 607 F.3d 1268, 1273 (11th Cir. 2010). "[A] plaintiff's complaint still must 'claim a right to recover under the Constitution and laws of the United States,'" *Id.*, quoting *Bell v. Hood*, 327 U.S. 678, 681 (1946). Tellingly, Indian law is a part of federal common law, as explained below.

The Tribe's judgment, filed by a plaintiff with the district court, was not seeking traditional relief. The plaintiff had sought and obtained relief in the tribal court, and the only thing it wanted in the district court was recognition and enforcement of the judgment, which would have nothing to do with the merits of the case when it was litigated in the tribal court.

"Though a plaintiff seeking enforcement of a tribal court judgment does not plead a cause of action created by federal law, the action nonetheless is one 'arising under' federal law because it 'turn[s] on substantial questions of federal law.'" *MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 987 (D. Utah 2005), *rev'd on other grounds*, 497 F.3d 1057 (10th Cir. 2007). The Eleventh Circuit did not articulate a specific basis on which a tribal judgment could be considered by a federal court for recognition and enforcement. The panel stated that "[a] suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory or common law," and that the district court accordingly lacked § 1331 jurisdiction to handle the matter. *Miccosukee*, 607 F.3d at 1275. The Ninth Circuit categorically

disagrees: "We apply federal common law when a federal rule of decision is 'necessary to protect uniquely federal interests.' Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and an intricate web of judicially made Indian law." *Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997) (citations omitted). This split is direct and carries wide-reaching implications for interactions with federally-recognized Indian tribes; this Court's immediate review is needed.

III. THE PRINCIPLES TO BE APPLIED IN TRIBAL JUDGMENT ENFORCEMENT PROCEEDINGS FALL WITHIN FEDERAL COMMON LAW

This Court set forth the principles of comity, regarding foreign judgments, more than a century ago. The Circuit panel, through its silence, wrongly implied that comity does not matter for district court jurisdiction, contrary to this Court's guidance:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the

> judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Hilton v. Guyot, 159 U.S. 113, 202-03 (1895). The Restatement (Third) of the Foreign Relations Law of the United States, in Section 481, echoes the comity principle. "[A] final judgment of a court of a foreign state granting or denying recovery of a sum of money . . . is conclusive between the parties, and is entitled to recognition in courts of the United States." As explained below, two other circuits have given meaning to that recognition. Section 482 sets forth two mandatory restraints on embracing a foreign judgment, particularly where the foreign court did not have personal or subject matter jurisdiction over its adversaries, and where the tribunal did not properly provide due process of law in its proceeding.[2]

"Although courts in this country have long recognized the principles of international comity and have advocated them in order to promote cooperation and reciprocity with foreign lands, comity remains a rule of 'practice, convenience, and expediency' rather than of law." *Pravin Banker Associates v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997), quoting *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971). *See also International Nutrition Co. v. Horphag Research, Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001). Under that principle, federal common law applies as

---

[2] Section 482 lists six additional constraints on which a United States court could exercise discretion in assessing a foreign judgment.

a district court determines whether to recognize and enforce a foreign judgment. Under comity, a district court does not otherwise decide the merits of the dispute that emerged in the tribal court; the tribal court decided them. As the Court explained in *Hilton*, the tribal dispute "should not . . . be tried afresh" in a federal court. *Hilton*, 159 U.S. at 203.

The *Hilton* principle has been utilized and applied by many federal courts over many decades, establishing thereby that considering a foreign judgment fits within federal common law. To illustrate that point, the Second Circuit referred to "the federal common law comity analysis conducted by courts pursuant to *Hilton*." *In Re Treco*, 240 F.3d 148, 158 (2d Cir. 2001).

"[T]he quintessentially federal character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require[s] that the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law." *Wilson*, 127 F.3d at 813. To allow dozens of states to intermix state law with tribal judgments would foster a mixed array of outcomes that would hardly be consistent with the federal outcomes.

On two occasions, the Ninth Circuit invoked comity as an aspect of federal common law to consider whether to recognize and enforce a tribal court judgment. The *Wilson* court engaged in a very detailed exploration of whether and how a tribal judgment stemming from a vehicle accident involving an Indian and a non-Indian might be recognized and enforced by a federal court. Ultimately, the Ninth Circuit concluded, based on

the doctrine of comity, that the tribal court had lacked jurisdiction and that the United States would not recognize the judgment.

In a subsequent decision, *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (9th Cir. 2001), the court applied the same comity principles and concluded that a tribal judgment would not be recognized because those proceedings had deprived one side of due process.

The Tenth Circuit espoused the same view: "The question of the regulatory and adjudicatory authority of the tribes – a question bound up in the decision to enforce a tribal court order – is a matter of federal law giving rise to subject matter jurisdiction under 28 U.S.C. § 1331." *MacArthur v. San Juan County*, 497 F.3d 1057, 1066 (10th Cir. 2007).

The Eleventh Circuit did not address any of those decisions, but it firmly disagreed with that legal rationale. It said that consideration of a tribal judgment simply could not take place in a district court for want of subject matter jurisdiction there. This Court, moreover, has plainly stated that 28 U.S.C. § 1331 incorporates "claims founded upon federal common law as well as those of a statutory origin." *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985), and widespread application of comity through the years – not discussed at all by the Eleventh Circuit panel – evidences federal common law.[3]

---

[3] Kraus-Anderson categorically disagrees with the Tribe's proposition in its petition that significant law, and opinion, exists that should place tribal judgments under full faith and credit laws because the tribes are properly "territories." There is no sound law to support that. To the contrary, substantial

IV. THE TRIBE HAS SOVEREIGNTY LIKE THAT OF A FOREIGN NATION

In *Hilton*, the Court outlined the purpose of comity: "to secure an impartial administration of justice between the citizens of [this] country and those of other countries." 159 U.S. at 202.

If judgments issued by sovereign foreign countries can readily be reviewed by federal courts in the United States, why cannot a judgment issued by a sovereign Indian tribe be afforded the same review?

Indian tribes in this country are not territories or possessions. The sovereignty that the Indian tribes retain is of a unique, albeit limited, character. "It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers." *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978). "The tribes' retained sovereignty reaches only that power needed to control internal relations, preserve their own unique customs and social order, and prescribe and enforce rules of conduct for their own members. Toward this end, the Supreme Court has recognized that a tribe may regulate any internal conduct which threatens the political integrity, the economic security, or the health or welfare of the tribe." *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009). Tribal judgments on such issues have much to do with tribal confidence and integrity.

The Eleventh Circuit has not acknowledged that tribal sovereignty matters for comity purposes. Instead, the panel concluded that the tribe can enter into a district court only as a plaintiff in a lawsuit

---

law exists to support the application of comity to those judgments.

predicated on federal law. But if a tribe's sovereignty does not matter, for purposes of comity, that tribe can hardly have even limited standing as a nation.

V. MANY TRIBES ARE BECOMING ECONOMIC POWERHOUSES THAT WOULD BENEFIT FROM MORE FEDERAL VIGILANCE

In 1987, this Court approved Indian gaming because tribes were considered sovereign entities. In barely more than two decades, a large number of Indian tribes have eagerly embraced the gaming industry with enormous economic results. According to the National Indian Gaming Commission, 233 tribes operate casinos, and had more than 26 billion dollars in revenues in 2009. That kind of money generated in the equivalent of foreign nations equates with political and other power.

The merits of that business are not to be debated here, but it can be certain that tribal courts in those environments now deal with far more potent and impactful judicial disputes, most assuredly involving more disputes with non-Indians. That provides a very compelling reason to foster a consistent process of evaluating tribal judgments under federal auspices. The need for uniformity is paramount, and that cannot take place if an inconsistent pattern of state law deals with tribal judgments. Reversing the Eleventh Circuit's opinion will materially contribute to a vital level of stability and consistency.

CONCLUSION

Respondent, Kraus-Anderson Construction Co., supports the petition filed by the Miccosukee Tribe of Indians, and urges the Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit and review its decision in this case.

Respectfully submitted,

NORMAN DAVIS
Counsel of Record
SQUIRE SANDERS &
DEMPSEY, LLP
200 S. Biscayne Boulevard
Suite 4100
Miami, FL 33131
(305) 577-2988
ndavis@ssd.com

December 21, 2010

Counsel for Respondent